No. 82-1538

In the Supreme Court of the United States

OCTOBER TERM, 1982

HILLSDALE COLLEGE, PETITIONER

v.

DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether petitioner is a recipient of "Federal financial assistance" as that term is used in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and is therefore required to execute an "Assurance of Compliance" with Title IX.

2. Whether petitioner's entire operation is a "program or activity" subject to Title IX because its students receive federal grants and loans.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 696 F.2d 418. The Final Decision of the Civil Rights Reviewing Authority in the Department of Health, Education, and Welfare (Pet. App. 43a-54a) is not reported. The Initial Decision by the Administrative Law Judge (*id.* at 55a-79a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a) was entered on December 16, 1982. The petition for a writ of certiorari was filed on March 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Sections 901 and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681-1682, and the applicable regulations, 34 C.F.R. Part 106, are reproduced at Pet. App. 80a-124a.

STATEMENT

1. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, provides in Section 901(a) (20 U.S.C. 1681(a)):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

Section 902 (20 U.S.C. 1682) authorizes the Department of Education to promulgate regulations to implement that provision, and to enforce its regulations by terminating federal assistance to any noncomplying education program or activity conducted by a recipient. The Department has adopted regulations[1] that define "Federal financial assistance" to include (34 C.F.R. 106.2(g)(1)(ii)):

> Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

The regulations also define a "recipient" of such assistance as (34 C.F.R. 106.2(h)):

> any * * * private * * * institution * * * to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

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[1]The regulations were actually issued by the Department of Health, Education, and Welfare ("HEW"), and were initially codified at 45 C.F.R. Part 86. Although HEW was responsible for the administration of Title IX when enforcement proceedings were begun against petitioner, we will refer for the sake of simplicity to the Department of Education and to the regulations as they now appear in 34 C.F.R. Part 106.

In order to monitor compliance with the statute and regulations, the Department has required that each recipient of federal financial assistance provide "assurance * * * that each education program or activity * * * to which this part applies will be operated in compliance with this part." 34 C.F.R. 106.4(a). In practice the assurance of compliance is provided by signing a form (34 C.F.R. 106.4(c)). The Assurance of Compliance Form which petitioner was requested to sign (Form 639A) simply states (Pet. App. 127a):[2]

> The applicant hereby agrees that it will:
>
> 1. Comply, to the extent applicable to it, with Title IX of the Education Amendments of 1972 * * * and all applicable requirements imposed by or pursuant to the Department's regulation issued pursuant to Title IX * * *.

2. Petitioner Hillsdale College is a private, nonsectarian, coeducational college located in Hillsdale, Michigan. Although the College does not accept any direct federal or state aid, approximately one fourth of its students receive federal aid under various loan or grant programs.[3] In 1977,

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[2]A new form, adopted by the Department of Education in 1980, is reproduced as an Appendix to this brief. It contains a similar assurance.

[3]The school has an enrollment of approximately 1000 students. In 1977-1978, 107 students received National Direct Student Loan ("NDSL") aid under 20 U.S.C. 1087aa-1087ff. Fifty-four students received grants under the Basic Educational Opportunity Grant ("BEOG") Program, 20 U.S.C. 1070a. Fifty-three students were awarded federal funds by petitioner under the Supplementary Educational Opportunity Grant ("SEOG") Program, 20 U.S.C. 1070b-1070b-3. Fifty-one students secured Guaranteed Student Loans under 20 U.S.C. 1071-1087-4. Pet. App. 3a-4a. NDSL loans are made from a fund at the school (which may consist largely of federal contributions) and are repaid to the school, which then uses the money to make new loans. SEOG grants are similarly administered by the school itself.

(footnote continued)

after petitioner had refused voluntarily to execute an Assurance of Compliance, the Department instituted administrative enforcement proceedings. The administrative law judge ruled, on stipulated facts, that petitioner was a recipient of federal financial assistance within the meaning of Title IX because of the payments made to its students (Pet. App. 68a).[4] The administrative law judge nevertheless concluded that petitioner was not required to execute an Assurance of Compliance, because doing so would obligate the College to comply with regulations concerning sex discrimination in employment (see 34 C.F.R. 106.51-106.61), which several courts had held invalid (Pet. App. 77a-78a).[5]

Both the Department and petitioner filed exceptions with the Department's Civil Rights Reviewing Authority. The Reviewing Authority denied petitioner's exceptions, and agreed with the Department that petitioner was required to execute an Assurance of Compliance. By doing so, the Reviewing Authority concluded, petitioner would bind itself only to comply with lawful regulations; the validity of the employment regulations was therefore irrelevant to this enforcement action (Pet. App. 52a).[6]

BEOG grants may be made directly to students following certification by the school. GSL loans are made by private lending institutions and guaranteed by the federal government (Pet. App. 59a-60a).

[4]The administrative law judge found, though, that the GSL program fell within the exemption provided in Title IX for contracts of insurance or guaranty. 20 U.S.C. 1682 (Pet. App. 76a).

[5]In *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), this Court subsequently held that employment discrimination came within the prohibition in Section 901(a) (20 U.S.C. 1681(a)), and that the regulations at 34 C.F.R. 106.51-106.61 were valid.

[6]The Reviewing Authority also disagreed with the administrative law judge's determination that the GSL Program fell within Title IX's exemption for contracts of insurance or guaranty (see note 4, *supra*), since the government not only guaranteed such loans but also paid interest on them (Pet. App. 52a-54a). This question is not before this Court in this case.

3. Petitioner sought review of the decision in the Sixth Circuit pursuant to 20 U.S.C. 1683. It argued that the receipt by its students of federal financial assistance did not make it a "recipient" of assistance for purposes of Title IX. Petitioner also argued that its failure to sign an Assurance of Compliance did not justify termination of federal assistance, since under the statute that sanction could be invoked only upon a showing of actual sex discrimination. Finally petitioner contended that, even if it were subject to regulation under Title IX as to its student loan and grant programs, the Assurance of Compliance was inconsistent with the "program-specific" limitations in Title IX because the Department had interpreted it as subjecting the entire institution to regulation if its students received loans and grants (Pet. App. 6a-7a).

The court of appeals reversed the order of the Reviewing Authority.[7] It agreed with the Department that petitioner was a "recipient" of federal financial assistance within the meaning of Section 901 because its students received federal loans and grants. The court went on to say that in such cases "the student loan and grant program is subject to Title IX regulation" (Pet. App. 25a). The court also agreed with the Department that federal funds could be cut off without a finding that the college was actually discriminating on the basis of sex (*ibid.*). Nevertheless, the court concluded that (*id.* at 25a-26a):

> the regulation requiring [petitioner] to execute the Assurance of Compliance as a condition for its students receiving loans and grants is, as it is applied here,

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[7]The judgment was entered on December 16, 1982 (Pet. App. 42a). Judge Brown noted that Judge Cecil had concurred in his opinion prior to his death on November 26, 1982 (Pet. App. 1a n.*). Chief Judge Edwards dissented.

> an invalid regulation. This is true because the regulation and the Assurance, as interpreted and applied by [the Department], cover the entire college and are not limited to the student loan and grant program.[8]

Chief Judge Edwards dissented. He would have upheld the decision of the Reviewing Authority on the ground that, under each of the assistance programs from which Hillsdale students receive grants and loans, the federal government provides "funds which when paid to the college are used for the general support of the educational program of the college as a whole" (Pet. App. 34a). He concluded that if a college receives federal financial assistance in that manner, Congress intended Title IX's prohibition of sex discrimination to apply to the college as a whole (*id.* at 35a-39a).

DISCUSSION

1. This case is similar to *Grove City College* v. *Bell*, cert. granted, No. 82-792 (Feb. 22, 1983). In *Grove City College*, as here, the Department determined that the college was a recipient of federal financial assistance because its students used federal grants and loans to finance their education. When Grove City refused to execute an Assurance of Compliance, the Department instituted enforcement proceedings to terminate assistance for Grove City students under the Basic Educational Opportunity Grant ("BEOG") and Guaranteed Student Loan Programs. The Third Circuit held that Grove City must file the Assurance of Compliance required by the Title IX regulations because the College was a recipient of federal financial assistance within the meaning of Title IX by virtue of its participation in the Department's BEOG program.

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[8]Because of that conclusion, the court found it unnecessary to decide whether the GSL Program fell within the exemption found in Section 902 for contracts of insurance or guaranty.

In this case the Department instituted enforcement proceedings against petitioner for the same reason. The Sixth Circuit, like the Third Circuit in *Grove City College*, held that petitioner was a recipient of federal financial assistance within the meaning of Title IX by virtue of its participation in the Department's various loan and grant programs. The Sixth Circuit also agreed with the Third Circuit that termination of funds was an appropriate sanction for failure to comply with the Department's Title IX regulations, even absent a showing of sex discrimination (cf. 82-792 Pet. App. A35-A37). The court of appeals in this case nevertheless concluded that the Department could not require petitioner to execute an Assurance of Compliance, because it read that assurance as requiring compliance by the entire college, rather than by particular programs receiving federal funds.

2. The petition presents two questions for review. The first is whether petitioner is a recipient of "Federal financial assistance" within the meaning of Title IX because many of its students finance their education with federal grants and loans. The identical question is presented by the petition in *Grove City College, supra*, 82-792 Pet. i, Question 1. Both the Third Circuit in that case and the Sixth Circuit in this case agreed that a college is a recipient of "Federal financial assistance" under those circumstances. There is, consequently, no independent need to grant plenary review here on this issue; resolution of it should await the Court's decision in *Grove City College*.

3. The second question presented by petitioner is whether its entire operation is a "program or activity" subject to Title IX because its students pay a portion of their tuition with federal grants and loans. This question too is presented by the petition in *Grove City College, supra*, 82-792 Pet. i,

Question 2.[9] With respect to this question, too, the petition should be held pending the decision in *Grove City College*.

4. The "questions presented" by petitioner also raise the issue whether petitioner, if it is a "recipient" of "Federal financial assistance," is required to execute an Assurance of Compliance with Title IX. The court of appeals held that petitioner was not required to do so, "because the regulation and the Assurance, as interpreted and applied by [the Department], cover the entire college and are not limited to the student loan and grant program" (Pet. App. 25a-26a). In reaching that conclusion the court misapprehended the position the Department set forth in its supplemental brief to take account of this Court's decision in *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982). The Department there stated[10] that the assurance is

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[9]We wish to point out that petitioner prevailed on this issue in the court of appeals. And although 28 U.S.C. 1254(1) allows "any party" to petition for a writ of certiorari, this Court has apparently never granted a petition filed by one prevailing on the merits in the court of appeals. See R. Stern & E. Gressman, *Supreme Court Practice* 58-59 (5th ed. 1978); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4004, at 524-525 (1977 & 1982 Pocket Part); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 70-71 n.5 (1977).

[10]Supplemental Brief for Respondents at 3-4, *Hillsdale College* v. *Department of Education*, 696 F.2d 418 (6th Cir. 1982):

> In its decision in *North Haven*, * * * the Supreme Court agreed with the Department's position that the portion of the regulations setting out their purpose (34 C.F.R. 106.1 * * *) *is* program-specific and limits the scope of the regulations as a whole (slip op. 26-27). * * * All that the assurance of compliance requires the College to do is to agree to comply with the regulations as to any of its programs or activities which receives the assistance of student loan and grant funds provided by the federal government. * * * [W]e believe that * * * at least some of the education programs and activities of the College receive that assistance. In

coextensive with Title IX's coverage, and thus applies only to those programs and activities that receive federal support. The Department does not contend that execution of an assurance acknowledges Title IX coverage of an entire institution regardless of the nature of the federal financial assistance. Rather, the Department agrees with the court of appeals that Title IX's nondiscrimination requirements apply only to those educational programs and activities of an institution that receive federal financial assistance. Accordingly, assurances of compliance must also be written and construed in a program-specific manner.

Because the facts and issues presented by the two cases are similar, this Court's decision in *Grove City College* will likely determine whether the court of appeals was correct in concluding that petitioner was not required to execute an Assurance of Compliance.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Grove City College* v. *Bell*, No. 82-792, and should then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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APRIL 1983

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attacking the regulations as a threshold matter, the College would need to show that it operates no education program or activity that receives federal financial assistance. This it has not done.

We have lodged a copy of the Department's supplemental brief with the Court.

DOJ-1983-04

APPENDIX

CIVIL RIGHTS CERTIFICATE

ASSURANCE OF COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, SECTION 504 OF THE REHABILITATION ACT OF 1973, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, AND THE AGE DISCRIMINATION ACT OF 1975

The applicant provides this assurance in consideration of and for the purpose of obtaining Federal grants, loans, contracts (except contracts of insurance or guaranty), property, discounts, or other Federal financial assistance to education programs or activities from the Department of Education.

The applicant assures that it will comply with:

1. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance.

2. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in programs and activities receiving Federal financial assistance.

3. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 *et seq.*, which prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance.

4. The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.*, which prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance.

5. All regulations, guidelines, and standards lawfully adopted under the above statutes by the United States Department of Education.

The applicant agrees that compliance with this Assurance constitutes a condition of continued receipt of Federal financial assistance, and that it is binding upon the applicant, its successors, transferees, and assignees for the period during which such assistance is provided. The applicant further assures that all contractors, subcontractors, subgrantees or others with whom it arranges to provide services or benefits to its students or employees in connection with its education programs or activities are not discriminating in violation of the above statutes, regulations, guidelines, and standards against those students or employees. In the event of failure to comply the applicant understands that assistance can be terminated and the applicant denied the right to receive further assistance. The applicant also understands that the Department of Education may at its discretion seek a court order requiring compliance with the terms of the Assurance or seek other appropriate judicial relief.

The person or persons whose signature(s) appear(s) below is/are authorized to sign this application, and to commit the applicant to the above provisions.

_____

Date

_____

Authorized Official(s)

_____

Name of Applicant or Recipient

_____

Street

_____

City, State, Zip Code

END OF DOCKET